Supreme Court, U.S.
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No. 99-1971

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF CALIFORNIA;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

DON SOON PARK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that a state court's unelaborated citation of the state-law *In re Dixon*, 264 P.2d 513 (1953) rule as the sole justification for its denial of a pre-*In re Robbins*, 959 P.2d 311 (Cal. 1998) habeas petition did not constitute an adequate and independent state law ground of decision sufficient to bar federal habeas review.

2. Whether the court of appeals' holding is consistent with the exhaustion and procedural default doctrines as articulated in this Court's decisions, including *Coleman v. Thompson*, 501 U.S. 722 (1991), *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) and *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000).

3. Whether the court of appeals' holding respected federalism and comity interests because the court correctly applied the adequate and independent state law ground doctrine and did not impinge on the State's ability to define its procedural bar rules as it sees fit.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 31a-54a), filed on January 21, 2000, is reported at 202 F.3d 1146. The first opinion of the court of appeals (Pet. App. 55a-73a), filed on January 14, 1999 and withdrawn on January 21, 2000, is reported at 164 F.3d 1226. The district court's opinion (Pet. App. 74a-96a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals issued its amended opinion on January 21, 2000, and denied the petition for rehearing and suggestion for rehearing en banc on March 9, 2000. *See* Pet. App. 105a-106a. The petition for a writ of certiorari was filed on June 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time that respondent's federal habeas petition was filed, Section 2254 of Title 28 of the United States Code provided in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody — pursuant to the judgment of a State court shall not be granted unless it appears that
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> * * *
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1996).

Petitioners ask this Court to grant certiorari to review whether the court of appeals in the present case properly interpreted a question of state procedural law in finding that the state's fundamental constitutional error exception to its procedural bar rule failed to constitute an adequate and independent state law ground of decision barring federal habeas review. Nothing in this case warrants review by this Court. *First*, the case presents a number of vehicle problems: the court of appeals' decision is interlocutory because the issue it addresses may be rendered moot after further proceedings; there are at least two possible alternative grounds for affirming the judgment; the decision concerns a narrow question of state law that is of little continuing importance because the rule at issue has no prospective application; and any consideration by this Court would be premature in light of the fact that two of the major Supreme Court decisions on which petitioners rely — *Edwards v. Carpenter*, 120 S. Ct. 1587 (2000) and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) — were issued in the past two years, leaving insufficient time for any potential conflict in their interpretation among the courts of appeals to become developed. *Second*, petitioners have not plausibly alleged any conflict between the court of appeals' holding and any decision of this Court, any other federal court of appeals, or the state supreme court. *Third*, the decision does not raise federalism concerns because the court of appeals has in no way prevented the state

court from interpreting its procedural bar rules as it sees fit. Petitioners' argument amounts to a request that this Court engage in mere error correction in a case where the court of appeals correctly applied existing state procedural law.

In any event, the court of appeals' holding is correct. The court faithfully adhered to the state supreme court's recent decision in *In re Robbins*, 959 P.2d 311 (1998), which both (1) *prospectively* reinterpreted the fundamental error exception to the *Dixon* procedural default as turning entirely on questions of state law, and (2) acknowledged that prior interpretation of that bar under *In Re Harris*, 855 P.2d 391 (1993), was not independent of federal law. Because Park raised federal constitutional claims in his state habeas petition, the court of appeals did not err in holding that the state court's pre-*Robbins* denial of Park's petition by way of an unelaborated citation to the state supreme court's decision in *In re Dixon* was not an independent state law ground of decision.

STATEMENT OF THE CASE

Respondent Don Soon Park was convicted in state court of five state law felony offenses arising out of two separate incidents. After an unsuccessful attempt to overturn his convictions on direct appeal, Park filed a petition for a writ of habeas corpus to the California Supreme Court, in which he alleged four new claims. The state supreme court summarily denied Park's petition, stating in full: "Petition for writ of habeas corpus DENIED. (*See In re Dixon* (1953) 41 Cal. 2d 756, 759)" *See* Pet. App. 97a-98a.[1] On federal habeas review, Park renewed his claims and added a claim based on improper consolidation. The district court dismissed the petition with prejudice. The court of appeals affirmed the district court's dismissal of three

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1. In *In re Dixon*, the state supreme court first established its general rule that habeas will not be granted "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *Id.* at 514-15.

of Park's claims, but reversed the district court's order dismissing two of Park's constitutional claims on grounds of procedural default. Slightly more than one year later, the court of appeals issued an amended opinion, in which it modified its reasoning but reached the same result.

1. Park was charged in conjunction with two different crimes: a home invasion that occurred in August 1991 and a liquor store bombing that occurred in June 1992. On June 27, 1993, the trial court granted the prosecution's motion to consolidate the two cases. The twelve-day consolidated trial began on February 28, 1994. The evidence on both the home invasion counts and the bombing counts consisted largely of testimony from a witness who had been a government informant, but many of the details of his informant status were never revealed to the defense. The trial court rejected respondent's efforts to seek additional information. On March 14, 1994, the jury convicted Park of conspiracy to commit robbery, conspiracy to commit burglary, first-degree residential burglary, and attempted first-degree residential robbery in conjunction with the home invasion incident, and with making terrorist threats in conjunction with the bombing incident. The state trial court sentenced Park to seven years and eight months in prison, and Park has since served his entire sentence. Pet. App. 39a.

2. On direct appeal, Park asked his appointed appellate counsel to raise all the claims later raised in his state and federal habeas petitions, but his counsel raised only the improper consolidation claim. On September 20, 1995, the state Court of Appeal affirmed the judgment of conviction. On November 29, 1995, the California Supreme Court denied Park's petition for review without citation to authority.

3. On February 2, 1996, Park filed a pro se petition for writ of habeas corpus in the California Supreme Court, raising the four claims that appellate counsel failed to raise on direct appeal: (1) prosecutorial misconduct in failing to disclose a witness's informant status; (2) abuse of the trial court's discretion in admitting a tape of Park's jailhouse conversations; (3) denial

of the right to a speedy trial due to the prosecution's delay in bringing the charges; and (4) denial of the right to effective assistance of counsel. On March 27, 1996, the court summarily denied the petition with an unelaborated citation to *In re Dixon*, 264 P.2d 513 (1953). *See* Pet. App. 97a-98a.

4. On April 22, 1996, Park filed a pro se federal habeas petition in district court, raising the same claims, and adding a claim for improper consolidation. A magistrate judge issued a report and recommendation denying the petition because of procedural default.[2] On September 23, 1996, the district court adopted the report and dismissed Park's federal habeas petition with prejudice. Pet. App. 88a-90a.

5. On appeal, Park argued that the district court erred by failing to conduct a complete procedural bar analysis and by declining to consider the merits of Park's habeas corpus petition. In an amended opinion authored by Judge Trott and filed on January 21, 2000, the court of appeals affirmed the district court's decision in part, reversed in part, and remanded. The court rejected Park's improper consolidation claim, but agreed with Park that the district court erred when it held that his constitutional claims were procedurally defaulted. The court remanded the questions of whether Park's speedy trial and prosecutorial misconduct claims amounted to constitutional violations to the district court.[3]

In addressing the procedural default issue, the court initially outlined the dual doctrines of exhaustion and procedural default. First, pursuant to this Court's interpretation of 28 U.S.C. § 2254 in *O'Sullivan*, "[b]efore a federal court may grant habeas relief

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2. Park's additional improper consolidation claim was denied on the merits.

3. The court affirmed on other grounds the district court's denial of Park's ineffective assistance of counsel claim, finding that this claim was not properly raised in his federal habeas petition. The court also affirmed on other grounds Park's claim alleging improper admission of jailhouse tapes.

to a state prisoner, the prisoner must [properly] exhaust his remedies in state court." Pet. App. 45a. Second, for a state's procedural default rule to bar federal habeas review, it "must provide 'an adequate and independent state law basis' on which the state court can deny relief." Pet. App. 45a (quoting *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991)). The court also noted the *Michigan v. Long*, 463 U.S. 1032 (1983) presumption that, "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Pet. App. 45a-46a.

Applying those principles, the court of appeals first reviewed the state law *Dixon* rule, which holds that a state habeas petitioner "must, if possible, have pursued his claims on direct appeal." Pet. App. 46a. Because Park failed to do so, the court found that he would normally be barred from bringing his federal petition, but only if the *Dixon* rule was an adequate and independent state law basis. Pet. App. 46a-47a. In the years after *Dixon*, confusion arose in the state courts over the proper interpretation of state procedural bar exceptions. In 1993, the state supreme court decided two cases, *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993), that were intended to clarify those exceptions. Under *Clark* and *Harris*, a court "would hear the merits of a claim in a state habeas petition, despite the petitioner's failure to bring the claim on direct appeal from the conviction, if the court found one of four exceptions," including the exception relevant in Park's case, "fundamental constitutional error." Pet. App. 47a.

The court of appeals next considered whether *Dixon*'s fundamental constitutional error exception — as applied after *Clark* and *Harris* but prior to the state supreme court's

1998 decision in *In re Robbins*[4] — was an "independent" state ground of decision, and concluded that it was not. Pet. App. 48a-49a. The court emphasized that, "No question can exist that *In re Harris* defined fundamental constitutional error by reference to federal law" because the *Harris* court (1) stated that fundamental error involves " 'the individual's right . . . to a fair trial under both the state and federal Constitutions,' " and (2) cited this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991), in defining such error. Pet. App. 49a.

The court observed that *In re Robbins*, 959 P.2d 311, 338 (Cal. 1998), adopted a new approach to fundamental constitutional error "from which it will now decline to consider federal law when deciding whether claims are procedurally defaulted," but that the new rule was to be applied prospectively only. Pet. App. 49a-50a. Because *Robbins* was decided after the *Dixon* rule was applied in Park's case, its prospective pronouncement was inapplicable. The court concluded that, "in light of *Robbins*'s acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court [in pre-*Robbins* cases] necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's habeas petition." Pet. App. 50a.[5]

Turning to *O'Sullivan* and Section 2254, the court of appeals found that Park should have raised his federal claims before the state supreme court on direct appeal. "His failure to

4. *In re Robbins*, 959 P.2d 311 (1998), was decided by the California Supreme Court while Park's appeal was pending in the Ninth Circuit. As explained, *infra*, the *Robbins* court issued a prospective holding that significantly altered the state courts' prior interpretation of the *Dixon* rule and its exceptions.

5. The court of appeals summarily denied the attorney general's motion to certify questions of state law to the state supreme court. *In re Park*, 202 F.3d 1146, 1148 n.1 (9th Cir. 2000) Pet. App. 39a n.5.

do so temporarily rendered those claims both unexhausted and potentially unexhaustible — or procedurally defaulted — because the time for leave to appeal 'has long passed.' " Pet. App. 50a-51a (citing *O'Sullivan*, 526 U.S. at 846). However, the court found that, by pursuing his claims on state habeas, Park had in effect revived them: "it can be fairly said under § 2254(c) that California, through its recognized exception to the *Dixon* rule, gave him the right 'to raise, by any available procedure, the question presented.' " Pet. App. 51a. Under *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991), " '[i]f the last state court to be presented with a federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available,' " so the court found that Park's right to raise his claims before the state supreme court was sufficient to satisfy Section 2254(c) as interpreted by *O'Sullivan*, even if Park had no right to review of his claims. Pet. App. 51a. The court of appeals explained that "Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims." Pet. App. 51a. That the state supreme court "did examine Park's claims for fundamental constitutional error" was all that was "required to exhaust [his] claim and to avoid procedural default." Pet. App. 51a. The court acknowledged that its analysis might differ in post-*Robbins* cases, but that under pre-*Robbins* law, "Park surely gave the state court the 'first opportunity to review his claim and provide any necessary relief' " as required by *O'Sullivan*. Pet. App. 51a.

Because Park's prosecutorial misconduct and speedy trial claims alleged federal constitutional error, the court of appeals found that *Dixon* was not an independent bar. Accordingly, the court reversed the district court's holding of procedural default on those two claims. The court found it unnecessary to reach the issues of whether the pre-*Robbins* *Dixon* rule constituted an "adequate" state law ground of decision, *see* Pet. App. 46a n.6, and of whether Park had

shown "cause and prejudice" sufficient to excuse any procedural default, *see id.* at 54a.[6]

REASONS FOR DENYING THE WRIT

Petitioners contend that the court of appeals erred when it found that the state supreme court's summary denial of Park's habeas petition did not present an independent state law ground of decision barring federal habeas review. According to petitioners, the court's holding that the state *Dixon* rule did not bar federal habeas review of Park's federal constitutional claims created a conflict among the courts of appeals as to whether a state court's rejection of a fundamental error claim is an independent state law ground. Petitioners secondarily argue that the court of appeals misapplied *O'Sullivan* by finding that Park's assertion of his claims on state habeas review lifted the bar to federal court review, and violated comity by applying a more stringent standard to California's procedural rules than to a parallel federal procedural default rule. Petitioners do not allege an intercircuit conflict as to either of those issues. Petitioners' reading of the court of appeals' decision is incorrect, and — under any interpretation — that decision does not present a conflict warranting review by this Court.

1. Nothing in this case warrants review by this Court, and in any event this is an unsuitable vehicle for resolving any of the issues raised by petitioners.

a. *Vehicle problems.* For a number of reasons, this case is a poor vehicle for the resolution of any question raised by petitioners.

First, the case comes to this Court in an *interlocutory* posture. The Ninth Circuit did not grant Park's writ of habeas corpus; it merely held that Park did not procedurally default his claims for relief. On remand, the district court can decide whether those claims for relief have any merit. If they do not,

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6. Petitioners filed a second petition for rehearing and suggestion for rehearing en banc, which was denied on March 9, 2000. Pet. App. 105a-106a.

then that would effectively render the core issue in this case — proper application of the fundamental constitutional error exception — moot. If they do have merit, then the State can again petition for review, and the Court can review the merits of those claims, as well as the merits of the court of appeals' procedural default holding, at that time.

Second, there are at least two possible *alternative grounds for affirming* the Ninth Circuit's judgment: that the state law ground is not adequate, or that the procedural default is excused by "cause and prejudice." If the Court decides to review the case, it may conclude that, in fact, one or both of those reasons are valid, and be forced to affirm the court of appeals' decision on grounds other than the questions presented, again making this case a poor vehicle.

Third, this decision concerns a *narrow question of state law*. Petitioners' alarmist predictions about the impact of the *Park* decision are unsubstantiated. Petitioners vastly overstate the scope of the *Park* decision in asserting that the "holding is so broadly stated that it jeopardizes *all* California state procedural bars imposed in cases prior to August 3, 1998, including more than 500 unresolved capital cases." Pet. 8 (emphasis added). The Ninth Circuit's holding does not address "all California state procedural bars," but rather, concerns only California's application of the *Dixon* procedural bar. *See Park*, 202 F.3d at 1153. Moreover, the Ninth Circuit's holding only impacts the application of *Dixon* to claims alleging federal constitutional error, and has no effect on the application of *Dixon* to claims of state law error. *See id.* ("the California Supreme Court necessarily made an antecedent ruling on federal law before applying the *Dixon* bar to any federal constitutional claims raised in Park's state habeas petition.") (emphasis added).

Fourth, even the narrow question of state law at issue has *little continuing importance*. The state law procedural rule at issue has been reinterpreted by the state court since Park's state habeas petition was denied, and therefore the ruling at issue in

this case has no prospective application and will have very little impact outside the confines of the present case. *See id.* ("We do not decide here whether *Robbins* establishes the independence of California's *Dixon* rule for the future."). The issues raised by this case will not arise in post-*Robbins* cases (i.e., post-August 3, 1998).

Fifth, any consideration by this Court would be *premature* in light of the fact that two of the major Supreme Court decisions on which petitioners rely — *Edwards* and *O'Sullivan* — were issued in the past two years. Lower courts have not yet had an adequate opportunity to apply those decisions, and therefore any disagreements about their application have not become developed.

b. *No intercircuit conflict.* Petitioners have not plausibly alleged any conflict between the court of appeals' holding and any decision of this Court, any other federal court of appeals, or any state supreme court. The only aspect of the decision that petitioners claim "sharply conflicts" with decisions of other courts is the court of appeals' purported failure to "grasp the distinction between the operation of the fundamental or plain-error exception for procedural bars and a plenary merits review." Pet. 19. In an effort to create an issue worthy of this Court's review, petitioners mischaracterize this case and the surrounding law.

Petitioners misinterpret *Park* to hold that a state fundamental error exception must always be interpreted to encompass a "plenary" merits review. *See, e.g.*, Pet. 9 ("[The Ninth Circuit's interpretation of *Robbins*] transforms a commonplace, limited, discretionary state procedural rule into a mandatory, plenary merits review rule for all alleged federal constitutional errors in all cases."). But far from holding that the state fundamental error exception mandated a "*plenary* merits review," the Ninth Circuit faithfully followed the state supreme court's statements in *In re Harris* and *In re Robbins* indicating that, in pre-*Robbins* cases, the fundamental

constitutional error exception necessarily involved a merits review.

None of the authorities offered as evidence of an intercircuit conflict survives scrutiny. Petitioners' discussion of allegedly conflicting dicta from this Court's decisions and allegedly conflicting authority from other circuits neglects to mention that most of those decisions depend entirely on the vagaries of the particular state procedural rule and factual context at issue, and are therefore readily distinguishable from the case at bar. Petitioners assert that *Park* conflicts with dicta from this Court's decisions in *Sochor v. Florida*, 504 U.S. 527 (1992), and *Engle v. Isaac*, 456 U.S. 107 (1981), but neither of those decisions stands for the broad proposition "that a review for 'fundamental constitutional error,' especially as a possible exception to a state procedural bar, is simply not a merits review." Pet. 20. Each turned on the particular contours of the state procedural bar at issue. In *Sochor*, the defendant's constitutional claim fell into a category of claims that the State's courts had already determined *did not* satisfy the fundamental error exception to Florida's procedural bar. 504 U.S. at 534 n.10. Unlike in *Park*, there was no basis for inferring that the state's application of the procedural bar to that particular defendant's claim implied any ruling on the merits. *Id.* Similarly, in *Engle*, this Court declined to find that the Ohio state court's application of a procedural bar encompassed an implicit ruling on the defendant's federal constitutional claims because the Ohio Supreme Court had previously held the *type* of constitutional error claimed by the defendant did not fall within the "plain error" exception to that bar. *Id.* at 125. Thus, unlike in *Park*, the state's procedural bar constituted an independent state law ground of decision.

Petitioners also ignore binding precedent of this Court that reached the same result as *Park* in an analogous case. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that the Oklahoma Supreme Court's application of a state procedural bar was not independent of federal law. Pursuant to state court interpretation of its own procedural bar rules, the state court

was required to reach the merits of the defendant's constitutional claims: "Under Oklahoma law, . . . federal constitutional errors are 'fundamental.' . . . Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75. Like the Oklahoma doctrine considered by the *Ake* Court, California's fundamental error exception encompasses a merits review of federal claims. *See infra.*[7] As in *Ake*, before applying the pre-*Robbins Dixon* bar to Park's claims of constitutional error, the California Supreme Court had to rule, "either explicitly or implicitly, on the merits of" Park's claims. The *Park* court's holding that the California waiver doctrine did not constitute an independent state law ground prohibiting federal review is therefore entirely consistent with this Court's jurisprudence.[8]

Rather than acknowledging *Ake*, petitioners cite court of appeals decisions considering state procedural rules that differ materially from the pre-*Robbins Dixon* rule. In *Mu'Min v. Pruett*, 125 F.3d 192 (4th Cir. 1997), the Fourth Circuit rejected the

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7. *In re Winchester*, 348 P.2d 904 (Cal. 1960), on which petitioners rely, Pet. 22, for the proposition that "[t]here is no doubt that California has traditionally defined its fundamental error review as a state law process," Pet. 22, is not to the contrary. *Winchester* merely held that the particular claimed error — the "denial of a fair and impartial trial" — amounted to a violation of the State Constitution, and therefore fell within the constitutional error exception. Nowhere did that case indicate that the constitutional error exception was interpreted exclusively by reference to state law.

8. Although *Ake* was a decision involving a procedural default on direct review, the adequate and independent state law ground doctrine applies equally to claims on habeas and direct review. *See Harris v. Reed*, 489 U.S. 255, 263 (1989) ("Although *Long* and *Caldwell* arose on direct review, the principles underlying those decisions are not limited to direct review . . . [T]he problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review.").

defendant's argument that the state court implicitly considered the merits of his federal constitutional claims when it conducted a mandatory review of his death sentence. Under the Virginia state law procedural bar at issue, mandatory review did "not require the court to examine the record for constitutional errors not specified on appeal." *Id.* at 197 (emphasis added). Because the constitutional errors asserted in the defendant's federal habeas petition had not been specified on appeal, the mandatory review was an independent state law ground of decision. *See also McCown v. Callahan*, 726 F.2d 1, 3-4 (1st Cir. 1984) ("review by the [Massachusetts state court] under a 'miscarriage of justice' standard does not automatically waive the state's 'contemporaneous objection' rule, for in conducting the review the state court typically applies state, not federal law," and the state court's "conclusion here clearly rests upon state cases that it cites"); *Simpson v. Matesanz*, 175 F.3d 200, 207 & n.4 (1st Cir. 1999) (state court's application of procedural bar exception for "new and substantial" claims was independent of federal law because determination that claims were not "new" was made exclusively by reference to state law; if denial had rested on "a finding that while petitioner's claim is new, it is, nonetheless, *not substantial* — a conclusion reached by analysis under and resting on federal law[,] [i]t could be cogently argued that such a denial does not rest *purely on state law* and so is not independent") (emphasis added); *Gutierrez v. Moriarity*, 922 F.2d 1464, 1469 (10th Cir. 1991) (stating in dicta that, under New Mexico procedural law, the "question of fundamental error" is "defined by state law," and is therefore an independent state law ground, but holding that the procedural bar was not an "adequate" state ground); *Willis v. Aiken*, 8 F.3d 556, 567 (7th Cir. 1993) ("Like New Mexico, [but unlike Oklahoma], Indiana mandates review on the merits of fundamental rights claims only when the denial of the right 'gives rise to a question of fundamental error as *defined by state law*.' ") (citing *Gutierrez*, 922 F.2d at 1469) (emphasis added).

Finally, contrary to petitioners' claim that the Seventh Circuit, in *Neal v. Gramley*, 99 F.3d 841 (7th Cir. 1996), "noted that Illinois, *like California* and many other states, 'provides a safety valve for situations in which enforcing a procedural default would mask a plain error,' " Pet. 21 (quoting *Neal*, 99 F.3d at 844 (emphasis added)), the decision in that case concerned only discusses *Illinois* procedural default law. The difference in result in that case, as in the other cases cited by petitioners, can be explained by the differences between the specific state procedural rule at issue and the pre-*Robbins Dixon* rule. In cases applying the prospective rule announced in *Robbins*, the Ninth Circuit may well find that the *Dixon* rule is now analogous to the state procedural rules in states like New Mexico, Indiana, and Illinois. But as to the pre-*Robbins* rule, the court of appeals was correct to hold that the denial of Park's petition was not an independent state law basis.

Other cases cited by petitioners are inapplicable because they merely rejected arguments that were considerably broader than *Park*'s limited holding. *See Tarver v. Hopper*, 169 F.3d 710, 713 (11th Cir. 1999) (" 'The *mere existence* of a 'plain error' rule does not preclude a finding of procedural default,' however. Likewise, state post-conviction proceedings do not preclude a finding of procedural default. [Defendant's] argument would allow federal review of procedurally defaulted claims in every state with state post-conviction proceedings.") (emphasis added, citation omitted); *Wilson v. Moore*, 178 F.3d 266, 276-277 (4th Cir. 1999) (rejecting defendant's argument that South Carolina's "fundamental fairness" procedural bar necessarily required a merits review of his claims because, "[a]ccording to [defendant's] argument, habeas petitions invoking the original jurisdiction of the South Carolina Supreme Court are free of procedural strictures and can never be rejected on procedural grounds under any circumstances"). *Park* does not conflict with *Tarver* or *Wilson* because it did not hold that the *mere existence* of California's fundamental constitutional error exception or

the mere availability of state habeas review precludes a finding of default.[9]

In sum, none of the decisions cited by petitioners holds that it is categorically unreasonable to conclude that a state court implicitly reviewed the merits of a petitioner's constitutional claims when it applied a fundamental or plain error exception to its state procedural bar. Instead, those courts held that the state's application of the procedural bar was independent of federal law because (1) the exceptions to the state's procedural bar were defined exclusively by reference to state law, (2) the constitutional error asserted in the defendant's petition was of a type that, as a matter of state law, was excluded from the relevant plain/fundamental error exception, or (3) the defendant's argument that the existence of a plain error exception to a default rule necessarily opened the defendant's habeas claims to federal review was overbroad. None of the decisions involved California law, and none of them contradicts or even speaks to *Park*'s core holding that the state court's application of the *Dixon* procedural bar to Park's claims was not a clear and unambiguous statement of the court's reliance on an independent state law ground.

c. *No impingement on state court's prerogative to define state procedural bars.* Petitioners imply that the *Park* decision prevents state courts from defining their procedural default rules as they see fit. *See, e.g.*, Pet. 22 (" '[A] state's efforts to stop gross miscarriages of justice should not suddenly force it to grapple with complex federal issues that its procedural rules would otherwise lawfully bar.' ") (quoting *McCown v. Callahan*, 726 F.2d 1, 3-4 (1st Cir. 1984)). The court of appeals' opinion in no way prevents the state court from crafting a procedural bar

9. The Tenth Circuit's decision in *Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991), did not even consider the question addressed by *Park*. *See id.* at 1189 ("The focus of [defendant's] challenge to Utah's procedural default rules is on the adequacy of those rules, not their independence from federal law. We accordingly *do not address their independence*.") (emphasis added).

that is independent of federal law. The court of appeals faithfully adhered to *Robbins*' pronouncement of a prospective rule and to its acknowledgement that prior state court interpretation of the fundamental constitutional error exception was not independent of federal law. *Robbins* is the state court's attempt to articulate a prospective reinterpretation of the *Dixon* bar that is truly independent of federal law. Because the court of appeals' decision expressly declined to reach the issue of whether that attempt had succeeded, its decision in *Park* can in no way be construed as an effort by the court of appeals to impinge upon the state court's prerogative to define its procedural bar rules as it sees fit.

d. *Mere error correction.* In sum, petitioners' arguments amount to a request that this Court engage in mere error correction in a case where the court of appeals correctly applied existing state procedural law. Because all this case concerns is whether a panel of the Ninth Circuit correctly read a State's summary dismissal order, it presents neither a question of national importance nor one that divides the circuits. It is a textbook example of a petition calling for case-specific error correction; something this Court has made clear it is not in the business of doing. *See* Sup. Ct. R. 10 (2000) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").[10]

2. Even the task of error correction would be futile here. The court of appeals correctly held that the state supreme court's summary denial of respondent's habeas petition, supported only by an unexplained citation to *Dixon*, was not an independent

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10. It is also worth noting that the federal petition for writ of habeas corpus in this case was filed on April 22, 1996, before the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214 ("AEDPA"), went into effect. Thus, AEDPA has no application in this case, *Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997), further indicating how little this case concerns questions of national importance.

state law ground of decision sufficient to bar federal habeas review. As the court of appeals recognized, state courts applying the *Dixon* exceptions — after *In re Harris* but prior to the state supreme court's recent re-interpretation of that doctrine in *In re Robbins* — "necessarily" considered federal constitutional issues in determining whether the fundamental constitutional error exception was applicable. Petitioners assert (Pet. 15) that *Robbins* stands for the proposition that, "at least since *Clark* and *Harris*, the first three California state-law exceptions" to the *Dixon* procedural bar, including the fundamental constitutional error exception "have been applied with reference to state law." Petitioners' argument rests on a patent mischaracterization of *Robbins*.

First, petitioners quote a passage from *Robbins* stating that, " 'although our orders frequently address the merits when procedural bars apply, commonly they do not. . . . In no event is merit review invariable or obligatory when a procedural bar applies.' " Pet. 13 (quoting *Robbins*, 959 P.2d at 316 n.1); *see also* Pet. 23 (same). Petitioners neglect to mention that this passage is excerpted from a section discussing procedural bars generally, not the fundamental constitutional error exception specifically. Because there are many circumstances under which a state court may have imposed a procedural bar where no federal-law-dependent exception to that bar had been raised, the quoted passage does not support petitioners' contention that, prior to *Robbins*, state courts did not "necessarily" look to federal law in applying the fundamental constitutional error exception.

Petitioners next quote another passage from *Robbins*:

> Although the [fundamental constitutional error] exception is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims — in applying this exception and finding it inapplicable we shall, in this case and in the future, adopt the following

> approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.

Pet. 14 (quoting *Robbins*, 959 P.2d at 338-39). Under petitioners' view, the court of appeals misinterpreted this passage to mean that, "prior to August 3, 1998," state review of a state habeas petition, "which involved checking for exceptions to state procedural bars, 'encompassed consideration by the court of the merits of federal constitutional questions. . . .' *Park*, 202 F.3d at 1153." Pet. 15. Petitioners also imply that the court of appeals' decision depends entirely upon this alleged misreading of a single passage from a single state supreme court decision. Both contentions are erroneous.

Contrary to petitioners' argument, the court of appeals' interpretation of that passage is correct. By stating that the fundamental constitutional error exception "is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims," and by making clear that its decision was prospective, *Robbins* acknowledged that prior state court interpretation of that exception had encompassed reviewing the merits of constitutional claims.

That reading of *Robbins* is also consistent with the state supreme court's earlier decision in *In re Harris*, on which the court of appeals relied. As the *Robbins* court correctly explained, "No question can exist that *In re Harris* defined fundamental constitutional error by reference to federal law." Pet. App. 49a (citing *Harris*, 855 P.2d at 399, 402); *see also* 855 P.2d at 403 (evaluating the merits of Harris's apparently federal-law-based due process and equal protection claims). Because: (1) Park raised federal constitutional claims in his state habeas petition, (2) California's *Dixon* bar contains an exception for fundamental constitutional error, (3) under *Harris*, prior to *Robbins*, application of the fundamental constitutional error exception included reviewing the merits of constitutional claims raised by a petitioner, and (4) in

imposing the *Dixon* bar, a court must "conclude[ ] that none of the four exceptions set out in [*In re Harris*] apply," *Robbins*, 959 P.2d at 338, the state supreme court's application of the *Dixon* rule in this pre-*Robbins* case was not an independent state law ground.

The remainder of petitioners' procedural bar argument is equally unpersuasive. Their argument that, in a footnote, *Robbins* "used the present tense to explain that 'whenever we *apply* the first three *Clark* exceptions [including the fundamental constitutional violation exception], we do so exclusively by reference to state law'," Pet. 15, ignores the context of that statement. The quoted statement was expressly prefaced with the phrase, "As explained in the text above and following . . . ," *id.* at 339, clearly referring to the passage in the opinion that made *Robbins*' new interpretation of the *Dixon* rule applicable on a prospective basis only. *See Robbins*, 959 P.2d 311, 338-39 ("[I]n applying this exception and finding it inapplicable we shall, *in this case and in the future*, adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation.") (emphasis added). Because the state supreme court's denial of Park's habeas petition occurred prior to *Robbins*, the passage quoted by petitioners is entirely inapplicable to Park.

Even assuming *arguendo* that petitioners were correct that application of the fundamental error exception in pre-*Robbins* cases did not "necessarily" involve issues of federal law, their argument would still fail. Petitioners imply that the court of appeals' decision stands or falls on the proposition that "California's fundamental-constitutional-error exception under *Dixon* or *Harris* requires plenary merits review of all constitutional claims in all cases," and then argue that *Robbins* does not support such a conclusion. Pet. 13. But even if it were true that, prior to *Robbins*, California courts did not conduct an "invariable or obligatory" merits review, Pet. 13, petitioners

cannot dispute the fact that state courts *frequently* conducted such a merits review. *In re Harris*, discussed *supra*, is an example. The *Robbins* court's statement that "the [fundamental error] exception is phrased in terms of error of constitutional magnitude — which obviously may include federal constitutional claims . . . ," 959 P.2d at 338, combined with the statement that its holding should be applied prospectively, at the least reflected that court's recognition that the exception had not previously been applied solely by reference to state law.

The court of appeals in *Park* was therefore correct to "note that the [state supreme court] did not make a clear statement that its decision was based on a bona fide, adequate, and independent ground." Pet. App. 41a (citing *Harris v. Reed*, 489 U.S. 255, 261 (1989)). It is well established that,

> when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [a federal court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Coleman, 501 U.S. at 733 (describing the *Long* presumption that there is no adequate and independent state law ground when the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion"); *see also Reed*, 489 U.S. at 263, ("[T]he problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review."). At least until *Robbins* was decided, a mere citation to *Dixon* without elaboration did not provide the plain statement of an adequate and independent state ground necessary to bar federal review.

3. Petitioners' assertion that the court of appeals erred by refusing to certify the state law question is without merit. First, as explained above, the Ninth Circuit followed the state supreme court's own clear statement of its pre-*Robbins* order practice: "When, in our orders, we impose the bars of *Dixon* [or] *Waltreus*, . . . , this signifies that we have concluded that none of the four exceptions set out in [*In re Harris*] apply." *In re Robbins*, 959 P.2d at 340 n.34. That statement in turn refers to the *Harris* decision, which demonstrated that a state court applying the fundamental constitutional error exception would first examine the merits of the constitutional claims alleged. Petitioners do not explain how this authoritative statement of pre-*Robbins* California order practice is to be distinguished away, so there was no unsettled question of state law for the Ninth Circuit to certify.

Second, it is black-letter law that the decision whether to certify a legal question to a state court is left to the discretion of the federal court. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal court."). Petitioners have not even alleged an intercircuit conflict on this question, and the courts of appeals that have considered the issue uniformly hold that certification is discretionary and should not be undertaken lightly, even when an unsettled question of state law is raised.[11]

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11. *See, e.g.*, *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976) ("In determining whether to exercise our discretion in favor of certification, we consider many factors."); *United Farm Bureau Mut. Ins. Co., Inc. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1015 n.10 (7th Cir. 1994) ("The decision to grant or deny a motion to certify a question of state law is discretionary"); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 775 n.7 (10th Cir. 1999) (same); *Escareno v. Noltina Crucible & Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998) (same).

Certainly, the court of appeals here did not abuse its discretion in refusing to certify a question on which the state's highest court had already issued an authoritative interpretation.

Petitioners rely primarily on *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). *Arizonans* presented an extreme scenario in which a federal court refused to certify a state law question and then invalidated a new state statute on federal constitutional grounds without permitting any state court to provide a saving construction of the law. *See id.* at 79. Here, by contrast, the *Park* court merely applied a longstanding state rule in conformity with the authoritative interpretation given that rule by the state's highest court.

Fiore v. White, 120 S. Ct. 469 (1999), is similarly unhelpful to petitioners. In *Fiore*, the petitioner and his co-defendant were convicted under state law at the same state court trial of operating a hazardous waste facility without a permit. Each defendant appealed to a different state appellate court. The petitioner's conviction was affirmed, and the state supreme court denied further review. The co-defendant's conviction was reversed, and the state supreme court affirmed, finding that the state statute did not apply to one who possessed a permit but deviated radically from its terms. The state supreme court did not specify whether or not its holding applied retroactively. After the state courts refused to reconsider the petitioner's identical conviction, he sought federal habeas relief. The district court granted his petition, but the court of appeals reversed. This Court certified to the state supreme court the question whether the state court's holding was retroactive and therefore applied to the petitioner's conviction. *See id.* at 472-73. The opposite result applies here, where the California Supreme Court had already issued a decision authoritatively stating that its new interpretation of the *Dixon* rule applies prospectively only, and explicitly recognizing that prior state court interpretation was different or at least ambiguous.

4. The court of appeals correctly held that Park's federal constitutional claims were not barred by this Court's decision in *O'Sullivan*. Petitioners argue that, because Park did not raise his claims on direct appeal, those claims are barred as a matter of federal law regardless of the grounds on which the state court denied his habeas petition. *See* Pet. 10, 24. Petitioners also misleadingly cite this Court's recent decision in *Edwards v. Carpenter*, 120 S. Ct. 1587, for the proposition that "Park's failure to abide by California's *Dixon* rule is the failure of fair presentation described in *O'Sullivan* and *Edwards*." Pet. 24-25.

Petitioners' analysis conflates the twin doctrines of exhaustion and procedural default. Both doctrines serve federalism and comity interests, but "the problem of waiver [*i.e.*, procedural default] is separate from the question whether a state prisoner has exhausted state remedies." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). The exhaustion doctrine requires that a federal court refrain from addressing a habeas petitioner's claims if there are remaining state court remedies *presently* available to the petitioner.[12] At the time the court of appeals considered Park's claims, Park no longer had any available remedies in state court, and therefore the exhaustion requirement was satisfied. *See Edwards*, 120 S. Ct. at 1592 (habeas petitioner's failure to abide by state procedural rules did not change the fact that he had " 'concededly exhausted his state remedies' "); *Engle*, 456 U.S. at 125 n.28 (exhaustion doctrine "refers only to remedies still available at the time of the federal petition").[13]

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12. *See* 28 U.S.C. § 2254(c) (employing present tense to codify the rule that a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he *has the right* under the law of the State to raise, by any *available* procedure, the question presented") (emphasis added).

13. *See also Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.").

The procedural default doctrine, on the other hand, pays credence to federalism and comity interests by looking to a state court's own procedural default rules (not federal law) to determine whether a petitioner's claims were *properly* presented to the state court. It is true that "vigilant enforcement of a state's procedural default rules is necessary to protect the integrity of the federal exhaustion requirement." Pet. 24. (citing *O'Sullivan*, 526 U.S. at 845-847). Otherwise, a petitioner could simply " 'let[] the time run' so that state remedies were no longer available," *Edwards*, 120 S. Ct. at 1592, and then seek habeas relief in federal court. Therefore, if claims were not properly presented pursuant to state law, the procedural default doctrine requires the federal court to apply or uphold the state court default rule *if* the rule constitutes an adequate and independent state law ground.

Under a correct interpretation of the exhaustion doctrine, Park's claims were exhausted by the time he filed his federal habeas petition because he no longer had any state court remedies available to him. Additionally, the state supreme court had already held that his claims had not been *properly* presented to the state court and therefore were procedurally defaulted under *Dixon*. As a result, the only inquiry remaining for the court of appeals was to determine whether the state court's holding that Park's claims were procedurally defaulted constituted an adequate and independent state law ground. On that issue, the court of appeals correctly held that the state's procedural default doctrine was not independent of federal law.

Petitioners erroneously posit that "[t]he determination of whether to impose [the *O'Sullivan*] bar does not depend on the complex questions of independence and adequacy, or the 'plain statement' rule of [*Harris v. Reed*]." Pet. 25-26. In support, petitioners quote — entirely out of context — language from *Coleman* footnote 1. *See* Pet. 26 (quoting *Coleman*'s statement that *Long*'s plain statement rule does "not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present is claims in order to

meet the exhaustion requirement would not find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas *regardless* of the decision of the last state court to which the petitioner actually presented his claims."). Petitioners' argument is flawed from the outset because the passage quoted refers only to the *Long* "plain statement" presumption and not to the adequate and independent state law ground doctrine itself. *See* 501 U.S. at 735 n.1.

Moreover, even with regard to the *Long* presumption, a close reading of the *Coleman* passage makes clear that its admonition does not apply to this case. The practical reason for the rule articulated in footnote 1 is explained by the footnote's underlying citation to Justice O'Connor's concurring opinion in *Harris v. Reed*, 489 U.S. 255 (1989), in which she stated that it would not make sense to "require a 'plain statement' indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim." 489 U.S. at 268-70 (O'Connor, J., concurring). The citation to *Harris* makes obvious the fact that *Coleman* footnote 1 was not meant to apply at all to a case like *Park* where the state court was given the opportunity both to "pass on . . . the procedural posture" and "the merits of [Park's] constitutional claim[s]." Thus, the *Long* presumption is applicable to this case.

Coleman footnote 1's statement that "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims," does not imply the existence of a "federal bar" that "goes into effect when the prisoner fails to exhaust his available appellate remedy" and that "is not lifted when he seeks the chance for a discretionary collateral hearing on the basis of a state-law exception to a state procedural rule." Pet. 26. That statement merely refers to the well-established rule that a federal court must faithfully apply state procedural default rules if a state court has not had an opportunity to apply those rules itself. For example, if the petitioner initially raised the federal claims

(*e.g.*, in the trial court, where they were considered on the merits), but later defaulted on those same claims (*e.g.*, failed to raise them again on appeal), and then raised them on federal habeas without first giving the state habeas court a chance to apply the state's procedural default rules, the federal court would be required to apply state procedural default law.[14] Nonetheless, if the state's procedural default rule did not constitute an adequate and independent state law ground, the federal court could evaluate the merits of the federal constitutional claims.

That petitioners are plainly wrong in claiming that the adequate and independent state law ground doctrine does not apply in this case is apparent from this Court's very recent decision in *Edwards*. That case stated that even a claim that had been procedurally defaulted in state court could be reviewed by a federal court if the federal court concluded that the state's procedural rule "does not constitute an adequate procedural ground to bar federal habeas review of the [defaulted] claim." *Edwards*, 120 S. Ct. at 1592.[15] That statement is consistent with numerous prior decisions of this Court. *See, e.g.*, *Reed*, 489 U.S. at 261-62 ("[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must actually have relied on the procedural bar as an *independent* basis for its disposition of the case.' ") (quoting *Caldwell v.*

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14. In such a case, considering the merits of the federal claims on federal habeas review would be inappropriate if the state procedural default rule is an adequate and independent state ground, notwithstanding the fact that the "last state court to which the petitioner actually presented his claims," *Coleman*, 501 U.S. 735 n.1, (in this hypothetical, the state trial court) addressed those claims on the merits.

15. In *O'Sullivan*, the Court had no occasion to address the adequate and independent state law ground doctrine, so its holding does not speak to this issue.

Mississippi, 472 U.S. 320, 327 (1985)) (emphasis added).[16] Because the court of appeals correctly held that the state procedural bar in this case was not an independent ground, no further review by this Court is warranted.

5. Petitioners' argument that the court of appeals has improperly disrupted federal-state relations — by strictly applying its own procedural bar, while holding that California's "identical" state procedural bar does not preclude federal review — is no more persuasive. Petitioners misconstrue this Court's decisions in *Coleman v. Thompson*, 501 U.S. 722 (1991), *Francis v. Henderson*, 425 U.S. 536, 542 (1976), and *Reed v. Farley*, 512 U.S. 339 (1994). None of those decisions stands for the proposition that comity prohibits a federal court from reviewing the independence of a state procedural bar simply because the federal court happens to apply a similar procedural bar to federal defendants. The existence of the federal bar is irrelevant to the issue of whether the state court clearly and unambiguously relied on an adequate and independent state law ground in denying the defendant's habeas petition. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (state defendant's habeas claims subject to federal review because state procedural bar was not independent of federal law); *Reed*, 489 U.S. at 263 (same). Prior to the new interpretation of *Dixon* offered in *Robbins*, it was impossible for a federal court to discern from the state supreme court's terse denial order in *Park* whether that decision clearly rested on an independent state law ground. Thus, it was appropriate for the federal court to permit review of Park's claims, regardless of the existence of similar federal default rules.

Moreover, petitioners misunderstand the scope of the *Park* holding. The court of appeals did not hold that California may

16. *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("State procedural bars are not immortal [and] may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.").

not impose a procedural bar similar to that imposed upon federal criminal defendants, nor did the court even reach the question whether the *Dixon* bar would be subject to federal review in post-*Robbins* cases. The court narrowly held that, at the time of Park's state habeas petition, California's application of the fundamental constitutional error exception implicated questions of federal law. The *Park* decision in no way impinges on the ability of the state supreme court to define its procedural bar rules as it sees fit, and to define those rules exclusively by reference to state law if it chooses to do so. Because, however, the state court had not clearly defined those rules by reference to state law prior to its prospective decision in *Robbins*, the court of appeals correctly held that the state procedural bar in this pre-*Robbins* case did not constitute an adequate and independent state law ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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